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No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners.

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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30 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Should the order of a district court confirming a consensual reorganization plan containing a $2.3 billion trust fund for the benefit of personal injury claimants be reversed solely because the plan includes a provision enjoining creditors with personal injury claims from pursuing those claims against third parties, who are allegedly joint tortfeasors with the debtor, where: (i) the purpose of such injunction is to channel all such claims to a trust for payment; (ii) the district court has determined that the cash to be paid into that trust is sufficient to pay all such claims in full; and (iii) the funds to be used to pay such claims would not be available without the injunction?

RULE 28.1 STATEMENT

As required by Rule 28.1 of the Rules of the United States Supreme Court, A. H. Robins Company, Incorporated states that its subsidiaries and affiliates, not wholly-owned, are: Lee Laboratories, Incorporated, Trimark Corporation, Eurand International, S.p.A., Eurand Microencapsulation, S.A., Eurand de Mexico, S.A. de C.V., Phariab Industrial Company, A. H. Robins Farmaceutica, S.A., Pharco Laboratories, Ltd., Eurand France, S.A., Eurand Espanola, S.A., and Diffucap Eurand, S.A. A. H. Robins Company, Incorporated has no parent company. As part of its confirmed plan of reorganization, A. H. Robins Company, Incorporated has signed a merger agreement with American Home Products Corporation and AHP Subsidiary (9) Corporation that has not been consummated as of this date.

American Home Products Corporation states that its subsidiaries and affiliates, not wholly-owned, are: CIE Realty Company, Inc., Geoffrey Manners & Co., John Wyeth (India) Limited, Wyeth Egypt S.A.E., Wyeth Nigeria Limited, Wyeth Laboratories Limited, Wyeth Laboratories (Bangladesh) Limited, Wyeth Laboratories (Pakistan) Limited, Wyeth-Suaco Laboratories Inc., 2236 Realty Co. Inc., Wyeth Laboratories Corporation, Nippon Sherwood Medical Industries Ltd., Wyeth (Taiwan) Ltd., and Wyeth-Ayerst Pharmaceuticals, Inc. American Home Products Corporation has no parent company.

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STATUTES INVOLVED

The statutues involved are 11 U.S.C. § 105(a) and 11 U.S.C. § 524(e). 11 U.S.C. § 524(e) is reproduced in the Petition. Pet. at 2. 11 U.S.C. § 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF OF RESPONDENT IN OPPOSITION

Respondent A. H. Robins Company, Incorporated ("A. H. Robins"), opposes the petition of various Dalkon Shield claimants ("Petitioners") for a writ of certiorari (the "Petition"). As discussed below, the Petitioners seek further review of matters which do not meet the suggested standards for review set forth in Supreme Court Rule 17.1 and were correctly decided below.

I.

COUNTERSTATEMENT OF THE CASE

As the courts below recognized, the injunction that Petitioners challenge must be evaluated in light of the myriad of unique facts in this case. By largely ignoring those facts, Petitioners' Statement of the Case fails to provide this Court with an adequate basis for evaluating the single issue on which they seek review. The most glaring omission in the Petitioners' factual recitation is the district court's finding that A. H. Robins' plan of reorganization (the "Plan") will provide payment in full to Dalkon Shield claimants.[1] Despite Petitioners' efforts to articulate a legal issue appropriate for review by this Court, Petitioners' Statement of the Case demonstrates that the key to their challenge to the Plan is their disagreement with that factual finding. Indeed, Petitioners recognize the significance of that finding when they admit that full payment of Dalkon Shield claims "might justify this Court in declining to hear [this] case . . . ." Pet. at 10.

A. *Background Facts*

In 1970, A. H. Robins acquired the rights to the Dalkon Shield, which it distributed internationally from 1970 to 1975. By mid-1985, there were almost 6,000 lawsuits and claims arising from the Dalkon Shield pending against A. H. Robins and, in many cases, against others with indemnification and/or contribution rights against A. H. Robins. Faced with the financial drain caused by soaring litigation costs and the inability to defend hundreds of suits at the same time, on August 21, 1985, A. H. Robins filed for reorganization relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

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[1] Both here and in the Petition, "Dalkon Shield claims" refers to personal injury claims asserted by users of the Dalkon Shield or by those with a personal relationship (*e.g.*, husband, child) to a Dalkon Shield user.

After several years of litigation and negotiation, and following a multi-million dollar, eighteen-month analysis of Dalkon Shield claims, A. H. Robins and the numerous parties in interest[2] in this case finally succeeded in negotiating a comprehensive and consensual plan of reorganization resolving this mass tort litigation. The Plan, which is dependent upon the acquisition of A. H. Robins by American Home Products Corporation ("AHP"),[3] was overwhelmingly approved by all classes of creditors, including 94% of the approximately 140,000 Dalkon Shield claimants who voted on it (71a).

In its order confirming the Plan, the district court recognized that the Plan reflects a complex set of compromises and settlements, of which the injunction is an integral and essential part (74a). It also made a factual determination that the payments being made by A. H. Robins and AHP under the Plan are sufficient to pay Dalkon Shield claimants in full (42a-43a) (the "Sufficiency Finding"), thus satisfying a key condition to consummation of the Plan.

1. *Estimation Of Dalkon Shield Claims*

Virtually all of the 195,000 Dalkon Shield claims filed in A. H. Robins' Chapter 11 case are unliquidated and disputed. In order to formulate and confirm a workable plan of reorganization, it was necessary to determine the aggregate value

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[2] Throughout this case the district court afforded to all interested parties the opportunity to participate and to be heard. To ensure adequate and competent representation of the various constituencies, including Dalkon Shield claimants, several official committees were constituted pursuant to section 1102 of the Bankruptcy Code: the Dalkon Shield Claimants' Committee, the Legal Representative of the Future [Dalkon Shield] Tort Claimants, the Equity Security Holders' Committee and the Unsecured Creditors' Committee, all of which forcefully advocated the interests of their constituents and participated in the formulation of the Plan.

[3] AHP has the absolute right to abandon the proposed acquisition, which has already been pending for 18 months, if all appellate review of the Plan has not been completed by December 31, 1989. Absent the acquisition, the Plan cannot be consummated.

of those claims.[4] Accordingly, the district court appointed Professor Francis E. McGovern as its expert to develop, in cooperation with the Dalkon Shield Claimants' Committee, the Unsecured Creditors' Committee, the Legal Representative of Future Tort Claimants, the Equity Security Holders' Committee (collectively the "Official Committees"), A. H. Robins and A. H. Robins' insurer, The Aetna Casualty and Surety Company ("Aetna"), a reliable data base to aid in analyzing and determining the aggregate value of the Dalkon Shield claims (62a). All of the interested parties and Professor McGovern retained experts to assist them in the collection, evaluation and analysis of data regarding Dalkon Shield claims (62a-63a).

This multi-million dollar claims analysis process took more than a year and a half to complete. It involved an in-depth analysis of detailed information concerning the claims of approximately 6,000 claimants who were scientifically selected as being representative of all claimants. The selected claimants responded to a detailed questionnaire and request for medical records. The process eventually resulted in the compilation of an extensive data base which was made available to all interested parties (63a).

Beginning on November 5, 1987, after months of preparation and discovery, the district court held six days of hearings,[5] at which it heard medical, statistical, epidemiological, and other expert testimony. Numerous briefs, memoranda and expert

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[4] Section 502(c) of the Bankruptcy Code provides that: "[t]here *shall* be estimated for purpose of allowance under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." (emphasis added); *see also A. H. Robins Co. v. Piccinin*, 788 F.2d 994, 1012 (4th Cir.) (estimation "is a mandatory obligation of the . . . court"), *cert. denied*, 479 U.S. 876 (1986).

[5] Petitioners were afforded the opportunity to participate in the hearings through counsel for the Dalkon Shield Claimants' Committee. Throughout the hearings, counsel for the Claimants' Committee consulted with counsel representing individual claimants or groups of claimants. Estimation Hearing Transcript at 8.

reports were submitted to the district court (63a). Through their witnesses, the parties in interest presented their estimates of the aggregate value of Dalkon Shield claims and introduced more than three hundred exhibits on the issue.

In weighing the evidence, the district court stated in no uncertain terms that it would resolve any and all doubts in favor of overestimating the value of the Dalkon Shield claims,[6] and that its estimate would be the highest amount consistent with credible evidence.[7] On December 11, 1987, the district court announced that the total amount of money necessary to pay all Dalkon Shield claims and related administrative expenses of the trust that would be established to evaluate and pay those claims (the "Claimants Trust") was $2.475 billion, payable over a reasonable period of time (the "Estimate").

2. *The Plan*

Following announcement of the Estimate, several prospective acquirors submitted proposals for the acquisition and reorganization of A. H. Robins. On January 19, 1988, A. H. Robins' board of directors accepted AHP's proposal, which subsequently was incorporated into, and provides the bulk of the funding for, the Plan. AHP's proposal, unlike any of the others, had the support of the Official Committees representing, among others, Dalkon Shield claimants, and of the court-appointed examiner in this case. It offered the highest and quickest payout to the claimants (65a) and a fund in excess of the Estimate (66a).

As highlighted by the district court (65a), AHP's proposal was premised on (i) payment of Dalkon Shield claims in full and (ii) freeing AHP, A. H. Robins, and their affiliates and respective personnel from any direct or indirect liabilities for, or

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[6] Estimation Hearing Transcript at 2434.

[7] The district court specifically stated: "[M]y ultimate estimation was higher than everyone, except the expert by the claimants' committee, and I have expressed from the bench, I have no confidence in him. His credibility was negligible." October 24, 1988 Hearing Transcript at 12.

involvement in litigation or claims regarding, the Dalkon Shield.[8] Thus, like every other potential acquiror of A. H. Robins, AHP conditioned consummation of its acquisition on entry of an injunction that would protect its investment, end Dalkon Shield litigation and ensure "global peace." Indeed, at the hearing on confirmation of the Plan, held in July of 1988, AHP's Chief Financial Officer testified that it was vital to AHP, as the prospective acquiror of A. H. Robins, that it be protected not only from the assertion of claims, direct and indirect, related to the Dalkon Shield, but also from *any* involvement in the expensive and acrimonious litigation regarding the Dalkon Shield.[9] Consistent with this position, sections 7.02(a)(vii), (ix) and (xv) of the Plan made it a condition to consummation of the Plan that the order confirming the Plan (i) contain the injunctive provisions set forth in the Plan, (ii) reflect that those provisions "are an integral part of the compromises and settlements incorporated in the Plan," and (iii) provide that "the provisions of the Confirmation Order shall be nonseverable and mutually dependent."

The cornerstone of the Plan is the non-reversionary payment by AHP and A. H. Robins of $2.3 billion in cash upon consummation of the Plan (not over time), a sum which the district court found exceeded the Estimate (66a).[10] The Plan also establishes a single claims resolution facility for the efficient, economical and uniform evaluation and payment of Dalkon Shield claims. The Plan's injunctive provisions channel Dalkon

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[8] The district court shared AHP's concern on this point, stating: "The Court deems AHP's concern in this regard to be well taken. An investment of the magnitude involved here requires all reasonable effort to, consistent with the law, end all Dalkon Shield litigation. . . ." (65a).

[9] *See* Confirmation Hearing Transcript at 158-160.

[10] $2.3 billion in cash, together with $50 million in insurance, is the *minimum* that will be made available for the payment of Dalkon Shield claims under the Plan. Of the $2.3 billion, $2.255 billion will be paid to the Claimants Trust on consummation. The remaining $45 million will eventually be paid from a second trust into the Claimants Trust if it is not used for the payment of indirect Dalkon Shield-related claims, such as claims based upon indemnification and contribution. *See* pages 12-13 of the disclosure statement relating to the Plan, annexed hereto as Appendix of Respondent.

Shield claims to the Claimants Trust for evaluation and payment, thus ensuring equality of treatment among the claimants and terminating piecemeal litigation over the Dalkon Shield (74a).

The Plan was overwhelmingly accepted by all classes of creditors and equity security holders, with over 94% of the Dalkon Shield claimants who voted on the Plan voting to accept it. It subsequently was confirmed by the district court following an evidentiary hearing on the Plan, and all objections to the Plan, including those of Petitioners, were overruled (45a).

Following confirmation, A. H. Robins fulfilled its obligation under section 6.07 of the Plan to pay $100 million to the Claimants Trust in order to (i) fund administrative and start-up costs of the Claimants Trust and (ii) pay claimants who elected to settle their claims under an abbreviated claims evaluation procedure provided for in the Plan. By mid-September 1989, the Claimants Trust had made significant progress in dealing with Dalkon Shield claims, and more than 80,000 Dalkon Shield claimants had settled their claims in exchange for payments from the Claimants Trust ranging from $125 to $725.[11] Thus, over 40% of the Dalkon Shield claims already have been satisfied using less than 3% of the minimum amount that will be paid to the Claimants Trust if the Plan is consummated.

B. *Decisions Below*

1. *District Court*

On July 25, 1988, the district court issued the order confirming the Plan (the "Confirmation Order") and a memorandum opinion in support thereof. The opinion and Confirmation Order explained the complex process by which the aggregate value of Dalkon Shield claims was ascertained (62a-64a), and found that the payments to be made by A. H. Robins and AHP[12] are in and

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[11] The Claimants Trust's payments to Dalkon Shield claimants occurred after the completion of the record below, and, therefore, are not reflected in that record.

[12] Additional funds may be available from Aetna pursuant to the settlement of a class action referred to in the Fourth Circuit's opinion as the "Breland"

(*Footnote continued*)

of themselves sufficient to pay in full all valid Dalkon Shield claims and administrative costs and expenses of resolving those claims (42a-43a, 73a).

The opinion also contains a discussion of the Plan's injunctive provisions, including a finding (80a-81a) that given the circumstances of this case, the district court had the power, under section 105 of the Bankruptcy Code, to approve the Plan's injunctive provisions. The district court found that such provisions were necessary to ensure a successful implementation of the Plan, and to ensure that AHP would receive the benefit of its bargain — *i.e.*, a reorganized A. H. Robins free from any liabilities, direct or indirect, or involvement in Dalkon Shield litigation. Moreover, the district court found that the injunctive provisions promoted equality of treatment of all Dalkon Shield claimants by channelling their claims to an independent claims resolution facility for evaluation and payment.[13] Finally, the

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class action (the "Breland Class Action" and "Breland Settlement") (15a). Those funds, however, are not necessary for the Sufficiency Finding; they provide a cushion over and above the Estimate.

The Breland Settlement is subject to a separate petition for writ of certiorari entitled *Alexia Anderson, et al. v. Aetna Casualty and Surety Company, et al.* However, if all appellate review of the Plan is completed by December 31, 1989, the Plan *must* be consummated, regardless of the status of the Breland Petition and Settlement. *See* Breland Class Action Pet. at 10, 14.

[13] The district court specifically found:

> "[T]his Court [has] jurisdiction to enjoin proceedings in other courts, enjoin parties from commencing or continuing litigation, and to otherwise approve the channelling [*i.e.*, injunctive] provisions in order to ensure: (i) the efficient administration of Robins' estate; (ii) the efficient administration of the [t]rusts; (iii) the systematic evaluation and payment of Dalkon Shield claims in an orderly, fair manner, applying the same rules to all; (iv) that the bulk of the funds in both [t]rusts are made available for the payment of Dalkon Shield personal injury claims pursuant to the same method of claims evaluation; (v) minimization of expenditures and transaction costs payable from the Other Claimants Trust, for protracted litigation of questionable value against third parties;
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> (*Footnote continued*)

district court found that the Plan's injunctive provisions are an integral part of a complex and interdependent web of compromises and settlements, without which this consensual Plan could not have been achieved (43a, 74a). *See also* Confirmation Order ¶ 35 (noting that "[t]he provisions of th[e] [Confirmation] Order are non-severable and mutually dependent") (50a).

2. *Court Of Appeals*

On June 16, 1989, the Fourth Circuit unanimously affirmed the Confirmation Order.[14] In doing so, the Fourth Circuit upheld the district court's Estimate and specifically rejected all of Petitioners' factual challenges to the Estimate (14a).

The Fourth Circuit also unanimously affirmed the district court's approval of the Plan's injunctive provisions, and rejected the Petitioners' argument that section 524(e) of the Bankruptcy Code is an absolute prohibition on the power of bankruptcy courts to enter such provisions. The Fourth Circuit specifically held that the circumstances of this novel and complex case justified the district court's use of its equitable power to approve the injunctive provisions in the context of the Plan. The Fourth Circuit echoed the district court's (and every potential acquiror's) concerns and concluded by holding that "where the entire reorganization hinges on the debtor being free from indirect

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> (vi) successful consummation of the Plan; (vii) that Dalkon Shield personal injury claimants do not bypass the Claims Resolution Facility, to the detriment of other Dalkon Shield personal injury claimants; (viii) equality of distribution to Dalkon Shield personal injury claimants; and (ix) rehabilitation and reorganization of Robins, free from direct and indirect involvement in further Dalkon Shield litigation."

(78a-79a); *see also* (79a-81a).

[14] A complete review of the Fourth Circuit's decision is not necessary in light of Petitioners' decision to abandon most of their prior challenges to the Plan. *See* Pet. at 2-3 ("[P]etitioners . . . at this point . . . object only to one element of the [P]lan . . . .").

claims such as suits against parties who would have indemnification or contribution claims against the debtor, we do not construe 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits." (19a).

II.

SUMMARY OF THE ARGUMENT

The Petition should be denied. The Petitioners' opposition to the injunctive provisions of the confirmed Plan is premised upon their disagreement with the Estimate and subsequent Sufficiency Finding, neither of which is suitable for review by this Court. The decision of the Fourth Circuit upholding the injunction created no conflict among the courts of appeals and correctly applied the relevant provisions of the Bankruptcy Code.

III.

REASONS FOR DENYING THE WRIT

A. *The Petition Is Premised On A Challenge To A Factual Finding That Is Not Suitable For Review By This Court*

Petitioners' challenge to the Plan is based on the false premise that there is a "substantial likelihood" that Petitioners will not be fully compensated for their injuries under the Plan.[15] Indeed, the Petitioners assert no fewer than three times in their Petition that there is a "substantial" risk they will not be fully compensated for their injuries.[16] The district court's finding of payment

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[15] Indeed, Petitioners' Question Presented expressly incorporates the assumption that "the fund created in the reorganization may not be sufficient to pay all creditors in full. . . ." Moreover, Petitioners concede that if the premise that "all the claimants would be paid in full. . .were correct, it might justify this Court in declining to hear the case . . . ." Pet. at 10.

[16] Thus, Petitioners state, with absolutely no support from the record, that "everyone recognized that there was a substantial risk that the fund might

(*Footnote continued*)

in full, however, is amply supported by the record, is not the subject of the Petition, and is not, in any event, suitable for review because of its fact-specific nature.

Far from supporting the assertion that there is a "substantial likelihood" that the Dalkon Shield claimants will not be fully compensated for their injuries, the record below in fact establishes that such claimants, including Petitioners, will be paid in full. Thus, following extensive evidentiary hearings at which the district court unequivocally stated that any error in the Estimate would be "on the up side," the district court specifically found that the money to be paid by A. H. Robins and AHP under the Plan would be enough to pay in full all Dalkon Shield claims (42a-43a, 64a, 66a).[17] Moreover, the Fourth Circuit upheld the district court's Estimate notwithstanding the Petitioners' challenges to that finding (14a). Now, rather than forthrightly challenge this finding of fact, Petitioners have chosen not only to ignore the finding, but even worse, to mischaracterize the record below.

Any challenge to the Sufficiency Finding, whether direct or indirect, must fail in light of the well-settled rule that findings of fact will not be overturned unless they are clearly erroneous, and the repeated admonition that:

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not be sufficient to pay all the claimants in full." Pet. at 5. Petitioners also erroneously assert that the Plan and disclosure statement support the proposition that there is a "substantial likelihood" of less than payment in full. Pet. at 10-11; *see also* Pet. at 11. In fact, the disclosure statement, which was mailed to claimants in April of 1988, points out that the Estimate may be proved to be "more or less" than the value of the claims, and it points out the benefits and consequences of each. Its primary thrust, however, is that the Plan would not go into effect unless the district court found that the Plan would pay Dalkon Shield claims in full. Subsequently, in July of 1988, the district court made that finding.

[17] The district court found that "[t]he compensation available for Dalkon Shield claims pursuant to the Plan and the merger. . . *exceeds* the Estimate as well as the liquidation value of the Debtor." (emphasis added) (66a).

> [a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949). The court below found that the Dalkon Shield claimants will be paid in full under the Plan.

B. *There Is No Conflict Among The Circuits*

Contrary to Petitioners' assertions, Pet. at 10-13, there is no conflict among the circuits regarding the operation of section 524(e) of the Bankruptcy Code.

Petitioners cite three cases in support of their purported conflict: *United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986), *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982), and *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985).[18] Examination of these cases and other relevant authority, however, shows there is no conflict among the circuits on the meaning of section 524(e).

United States v. Huckabee Auto Co. does not reflect a conflict with the Fourth Circuit on the meaning of section 524(e) because it never once cites that section of the Bankruptcy Code. Rather, that case turns on an interpretation of the Internal

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[18] The Petitioners also suggest that *United States v. Stribling Flying Service, Inc.*, 734 F.2d 221 (5th Cir. 1984), may be relevant. Pet. at 11. *Stribling Flying Service* merely held that the confirmation of a reorganization plan, by itself, does not release guarantors of debts dealt with in the plan. In *Stribling Flying Service*, unlike here, there was no provision in the plan enjoining suits against the guarantor. Consequently, the case had nothing to do with whether section 524(e) *prohibits* third-party injunctions in a reorganization plan and therefore does not conflict with this case. Moreover, while not necessary to its decision, the Fifth Circuit itself subsequently noted that "[Section 524(e)] does not . . . preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization." *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

Revenue Code and general issues of jurisdiction. 783 F.2d at 1548.

Union Carbide Corp. v. Newboles also does not reflect a difference between the circuits on the meaning of section 524(e). Indeed, it was not even decided under the current Bankruptcy Code. Rather, *Union Carbide*, decided under the Bankruptcy Act of 1898, 11 U.S.C. §§ 1 *et seq.* (repealed 1978), construed section 16 of the Bankruptcy Act, 11 U.S.C. § 34, which is worded differently from section 524(e). *See* section C.1., *infra*. The Seventh Circuit, in considering a reorganization plan that provided a 20% payment to creditors, held only that a creditor's acceptance of a reorganization plan did not in and of itself validate a third-party release under the Bankruptcy Act. *Id.* at 595. Thus, the Seventh Circuit has never considered (i) the significance of the differences between the wording of section 16 of the Bankruptcy Act and section 524(e) of the Bankruptcy Code, (ii) the interaction of Bankruptcy Code section 105, relied on by the Fourth Circuit below, *see infra* at C.2., and section 524(e), or (iii) the scope of section 524(e) in the context of a plan that provides full payment. This Court should not review an artificial conflict which Petitioners have attempted to manufacture between the Seventh and the Fourth Circuits.

Finally, the Petitioners rely on *Underhill v. Royal* for a purported conflict among the circuits. *Underhill* only construes section 524(e) to establish that consent of creditors alone is not enough to validate an injunction precluding suits against third parties. The Fourth Circuit's decision below does not conflict with *Underhill*, because the Fourth Circuit did not hold that acceptance of the plan by Dalkon Shield claimants was itself a sufficient basis for the injunctions. Moreover, *Underhill* is quite different from *Robins* because in *Underhill* the creditors were to receive only a fifty percent distribution and the reorganization plan was confirmed only after the parties stipulated that the release need not be approved as part of the plan. 769 F.2d at 1430. Thus, unlike here, the injunction in *Underhill* was not a prerequisite to or an integral part of plan confirmation, and no attempt was made to provide full payment to creditors.

Moreover, the Ninth Circuit's recent decision in *American Hardwoods, Inc. v. Deutsche Credit Corp.* (In re American Hardwoods, Inc.), No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. Sept. 15, 1989), clarifies the Ninth Circuit's interpretation of section 524(e). There, the court applied the *Underhill* decision to affirm an order denying a permanent injunction (that was not part of a reorganization plan) to benefit guarantors of a Chapter 11 debtor's liability. In so doing, however, the court stressed that an application of the Fourth Circuit's decision in *Robins* "would not dictate a different result." *Id.* at 3, 1989 U.S. App. LEXIS at 7. The Ninth Circuit distinguished *Robins* from *Underhill* and *American Hardwoods* on the "unusual facts" of the *Robins* case, noting that the *Robins* injunction was "essential to the plan" and that A. H. Robins' entire reorganization " 'hinged' on it." *Id.* at 3, 1989 U.S. App. LEXIS at 7-8. Petitioners, then, are arguing that there is a conflict between the Fourth and Ninth Circuits when the Ninth Circuit itself has noted that the facts here are unique and that the decision below is not inconsistent with its most recent decision concerning 524(e).

In short, then, Petitioners seek certiorari based on a difference of interpretation of a statute among the circuits when the circuits supposedly reflecting the difference either have (i) not even interpreted the statute at issue (Eleventh Circuit); (ii) interpreted a now-repealed statute with different language that was part of a different statutory scheme (Seventh Circuit); or (iii) stressed that the *Robins* case presented an unusual factual situation and does not conflict with its most recent application of the statute (Ninth Circuit). Thus, there is no conflict among the circuits for this Court to resolve.

C. *Section 524(e) Was Correctly Applied Below*

1. *Section 524(e) Does Not Prohibit The Injunctions*

This Court should not grant the Petition because this case was correctly decided. Petitioners' argument that the Plan discharges third parties in violation of section 524(e) of the Bankruptcy Code misconstrues the Plan's injunction and section 524(e). In fact, section 524(e), explaining the scope of a discharge, does

not by its terms have anything to do with whether a Plan may enjoin suits against third parties. Thus, section 524(e) provides:

> Except as provided in subsection (a)(3) of this section [relating to spousal debts], discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

By its plain language, section 524(e) merely clarifies the effect and extent of a discharge; it does not address what may or may not be in a plan of reorganization,[19] as the Fourth Circuit recognized below (19a). *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) ("section 524(e)...does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization") (dicta). As noted by this Court, "as long as the statutory scheme is coherent and consistent, there generally is no need to inquire beyond the plain language of the statute". *United States v. Ron Pair Enterprises*, ____ U.S. ____, 109 S. Ct. 1026, 1030 (1989) (construing Bankruptcy Code section 506(b)).

2. *Section 105(a) Empowered The District Court To Approve The Injunction*

Section 105(a) of the Bankruptcy Code supports the issuance of injunctions against third-party litigation in appropriate circumstances; that statutory provision gave the district court the power to approve the injunction here (78a). Indeed, section 105(a) of the Bankruptcy Code, which provides that "[t]he court

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[19] Section 524(e) replaces section 16 of the former Bankruptcy Act, 11 U.S.C. § 34 (repealed 1978), which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt." (Emphasis added). Section 16 was intended to clarify that by voting to accept a plan that results in a discharge of the debtor, a creditor does not inadvertently and automatically release a guarantor. *See* 1A Collier, *Bankruptcy* ¶ 16.02 at 1523-27 (14th rev. ed. 1978). Section 524(e) is less restrictive than section 16 in that it uses the words "does not" rather than the words "shall not."

may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," correctly was held by the Fourth Circuit here to empower the district court to enter the injunction (19a). *See generally Manville Corp. v. The Equity Security Holders Committee* (In re Johns-Manville Corp.), 801 F.2d 60, 64 (2d Cir. 1986) ("[I]n our view, if the bankruptcy court may ever use its equitable powers under section 105(a) to enjoin actions . . . it may exercise that power where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone by the other action.").

In this case, the district court appropriately used section 105 to foster the goals of the Bankruptcy Code. Specifically, the district court invoked that section to: (i) ensure equality of treatment to Dalkon Shield claimants, by channelling all Dalkon Shield claims to a trust for systematic evaluation and payment; (ii) protect the estate from unnecessary transactional costs by preventing lawsuits against third parties who would, in turn, assert claims against A. H. Robins; and (iii) maximize the funds available to Dalkon Shield claimants by eliminating AHP's concerns over the specter of endless post-confirmation Dalkon Shield litigation. In short, the district court used section 105 to ensure a cessation of the long, tragic and painful hostilities over the Dalkon Shield and to ensure a fair and lasting peace.

3. *There Has Been No Denial Of Due Process*

Although they did not raise the issue before the Fourth Circuit, Petitioners next argue that enjoining them from suing third parties "who were not before the bankruptcy court" denied the Petitioners a property right without due process of law. Pet. at 13, 14.[20] The issue of whether Petitioners were afforded due

[20] The third parties to whom Petitioners refer or allude (*e.g.*, A. H. Robins' officers and directors, Aetna, and law firms who represented A. H. Robins or Aetna in connection with the Dalkon Shield litigation) filed proofs of claim against A. H. Robins for indemnification, contribution and other claims, and hence, like Petitioners, were before the district court.

process, however, does not hinge on whether the parties whom they now wish to pursue were "before the court." Rather, the issue is whether Petitioners themselves were sufficiently "before the court" to enable the court to enter an order that affects their rights. Here, Petitioners asserted claims, had an opportunity to participate at every stage of the case, and were represented throughout by able counsel. They have had their day in court. *See Martin v. Wilks*, ____ U.S. ____, 109 S. Ct. 2180 (1989).

In fact, every case Petitioners cite considers whether individuals may be bound by orders entered when they arguably were not before the court. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (determining due process rights of unnamed class plaintiffs); *Martin v. Wilks*, 109 S. Ct. at 2184 (consent decrees entered in prior case did not preclude parties in subsequent case, who were not parties to the prior action, from seeking relief from actions purportedly taken pursuant to the consent decrees; "[a] judgment . . . among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings"); *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 762 (3d Cir. 1989) (if class member has not been given opportunity to opt out in class action involving both important injunctive relief and damage claims, member must either have minimum contacts with forum or consent to jurisdiction in order to be enjoined by district court that entertained class action).

Here, where Petitioners are being afforded the benefits of a Plan that has been found to be sufficient to pay all Dalkon Shield claims in full, following extensive hearings at which Petitioners had ample opportunity to participate, they cannot complain that the Plan's injunction violates the due process clause.

IV.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Dated: New York, New York
October 2, 1989

Respectfuly submitted,

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APPENDIX

OVERALL SUMMARY

1. If settlement of the Breland Case is approved by the District Court and upheld on appeal, *at least* $2,585,000,000 will be available to pay claims and administrative expenses of the Trust. The cash will also earn interest, which could result in hundreds of millions more dollars being available to pay your claims and administrative expenses of the Trust.

Total: $2,585,000,000 before interest

(a. $2,255,000,000 cash from Debtor
(b. 5,000,000 cash from E. C. Robins and E. C. Robins, Jr.
(c. 250,000,000 insurance from Aetna (Primary Excess Policy)*
(d. 50,000,000 cash from Aetna
(e. 25,000,000 cash from Successor Corporation (from Aetna money)
(f. Unknown amount of unused insurance that Robins and its subsidiaries have for Dalkon Shield claims (believed to be approximately $45 million)

Additionally, if the money in the Other Claimants Trust and available under the Outlier Policies of insurance is not needed to pay other types of claims, another $150,000,000 could be available over time to pay your claims and administrative expenses of the Trust.

Total: $150,000,000 before interest

(a. $50,000,000 insurance from Aetna (Outlier Policy)*
(b. 50,000,000 insurance from Aetna (Outlier Policy)*
(c. 50,000,000 cash from Other Claimants Trust**

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* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

** $5,000,000 of the $50,000,000 will be paid to the Other Claimants Trust by E. C. Robins and E. C. Robins, Jr., and $45,000,000 will be paid to the Other Claimants Trust by the Debtor.

MAXIMUM TOTAL (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) POTENTIALLY AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED: $2,735,000,000

MINIMUM AMOUNT (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) WHICH WILL BE AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED: $2,585,000,000

II. If settlement of the Breland Case is approved by the District Court but not upheld on appeal, *at least* $2,310,000,000 will still be available to pay claims and administrative expenses of the Trust. The cash will also earn a great deal of interest, which could result in hundreds of millions more dollars being available to pay your claims. Additionally, you could still have the right to try to obtain money from Aetna, either through the Breland Case or individually.

Total: $2,310,000,000 before interest

a. $2,255,000,000 cash from Debtor
b. 5,000,000 cash from E. C. Robins and E. C. Robins, Jr.
c. 50,000,000 insurance from Aetna (Primary Excess Policy)*
d. Unknown amount of unused insurance that Robins and its subsidiaries have for Dalkon Shield claims (believed to be approximately $45 million)

Additionally, if the money in the Other Claimants Trust and available under the Outlier Policy of insurance is not needed to pay other types of claims, another $100,000,000 (over and above what you may be able to get from Aetna) could be available over time to pay your claims and administrative expenses of the Trust.

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* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

Total:
$100,000,000
before interest

(a. $50,000,000 insurance from Aetna (Outlier Policy)*
(b. 50,000,000 cash from Other Claimants Trust

MAXIMUM TOTAL (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) POTENTIALLY AVAILABLE EVEN IF SETTLEMENT OF THE BRELAND CASE IS NOT APPROVED:

$2,410,000,000
plus any money you may be able to recover from Aetna

MINIMUM AMOUNT (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) WHICH WILL BE AVAILABLE EVEN IF SETTLEMENT OF THE BRELAND CASE IS NOT APPROVED:

$2,310,000,000
plus any money you may be able to recover from Aetna

* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.